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Supreme Court, U.S.
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No. 92-1072

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

CAROL WEAVER, VICKI HAHN, SHARRON L. CARROLL, ANGELA SEGRIST, LOIS KUPFERBERG, and ALICE TENNENBAUM,
Petitioners,

v.

JOSEPH L. STEGER, President, and JILL PARRIS, Interim Vice-President for Human Resources and Human Relations, University of Cincinnati; and DISTRICT 925, SEIU, AFL-CIO,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITIONERS' REPLY BRIEF

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February 1993

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ARGUMENT

I. DISTRICT 925 REWRITES THE COURT OF APPEALS' DECISION, WHILE IGNORING CONFLICTING VIEWS ON COGNIZABLE CLASS CONFLICTS.

District 925, SEIU, AFL-CIO's ("District 925") Brief in Opposition ("Opp.") is more significant for its omissions than its substance. Restating the district court's narrow reason for denying class certification (because "Plaintiffs refuse[d] to provide ... information related to Plaintiffs' ability to properly represent the proposed class," Opp. at i), District 925 ignores the broader principle guiding the Sixth Circuit's affirmance.[1]

The Sixth Circuit affirmed because it found that Petitioners' "choice of remedy is arguably antagonistic to the wishes of other employees." Pet., App. A at 14a. However, no **record evidence** even remotely suggests that absent class members do not want the relief sought by Petitioners.[2] To the contrary, the only

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[1] District 925 frivolously asserts that "this Court [does not] have before it a record which could allow it to review [the class certification] issue." Opp. at 13. The Sixth Circuit certainly had a sufficient record to reach a decision. Petition for a Writ of Certiorari ("Pet."), Appendix ("App.") A at 12a-15a. Likewise, the union curiously inveighs against Petitioners' invocation of their "alleged" or "so-called 'First Amendment privilege,'" Opp. at 2, 13, as "Plaintiffs' [sic] counsel's over-zealous deposition practice," *id.* at 8-9, and as a "tactic," *id.* at 13, neglecting to mention that the district court upheld Petitioners' First-Amendment privilege, Pet., App. D at 45a-46a, denying District 925's Motion to Compel and Motion for Sanctions. R. 22.

[2] Likewise, most cases cited by District 925 as consistent with the court of appeals' ruling, Opp. at 12 n.4, support Petitioners. In three, certification was denied because there was **evidence** that class members had conflicts relating to the subject matter of the suit with the named representatives. *United Indep. Flight Officers, Inc. v. United Air Lines*, 756 F.2d 1274, 1284 (7th Cir. 1985); *Peterson v. Oklahoma City Housing Auth.*, 545 F.2d 1270, 1273 (10th Cir. 1976); *Carroll v. American Fed'n of Musicians*, 372 F.2d 155, 162 (2d Cir. 1967), *aff'd on this point, rev'd on other grounds*, 391 U.S. 99, 103 n.4 (1968).

(continued...)

evidence of the practices and wishes of absent class members—"potential objectors," *Teachers Local No. 1 v. Hudson*, 475 U.S. 292, 306 (1986)—shows that not a single nonmember ever voluntarily contributed even a dime to District 925. R. 26, Ex. B at 3, Answer to Interrogatory 2. Of course, even Petitioners' complete success would not prevent anyone from contributing to District 925 in the future, if they choose to.

Thus, District 925 fails to address the first Question Presented, Pet. at i, *ipso facto* conceding that the Sixth Circuit affirmed the denial of class certification based upon its "sheer speculation," *McKesson Corporation v. Division of Alcoholic Beverages & Tobacco*, 496 U.S. 18, 46 (1990), about "the wishes of other" class members. Pet., App. A at 14a. District 925 thus ignores well-established principles regarding class actions,[3] and overlooks those six circuits which have held that even real evidence that absent class members do not want remediation and vindication of their rights does not create judicially cognizable class conflicts. *See* Pet. at 13-14.

District 925 also evades the Question Presented by redefin-

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[2](...continued)
In a fourth, *Ihrke v. Northern States Power Co.*, 459 F.2d 566, 572 (8th Cir.), *vacated as moot*, 409 U.S. 815 (1972), the class was denied as unnecessary. The court cited possible conflicts as an additional justification, speculating regarding the consequences of success by the class representatives. In *Phillips v. Klassen*, 502 F.2d 362, 367 (D.C. Cir.), *cert. denied*, 419 U.S. 996 (1974), the court determined that where the challenged action "may be taken as conferring economic benefits or working economic harm, depending on the circumstances of the individual, the foundations of maintenance of a class action are undermined." Here, no such danger appears, since all nonmembers suffer economic harm by reason of fee seizures to which they would not otherwise be subjected.

[3] District 925's claim that "Petitioners cite no conflicting rulings on class issues in agency fee litigation from any other Circuit," Opp. at 12, simply ignores Petitioners' Brief at 14 (referencing Pet. at 8 n.6), citing most of the reported cases certifying identical classes. *See* n.4, *infra*.

ing the class sought. Curious is the union's argument that Railway Labor Act jurisprudence casts "serious doubts about the propriety of any class action on behalf of non-union members objecting to union agency fees," Opp. at 9, citing *Railway Clerks v. Allen*, 373 U.S. 113, 119 (1963), and *Machinists v. Street*, 367 U.S. 740, 774 (1961), since the courts below did not rely upon *Allen* and *Street* to deny certification. This is probably because those cases involved an entirely different cause of action. That is, in *Allen*, 373 U.S. at 119, and *Street*, 367 U.S. at 774, only objecting employees subject to a union- or agency-shop agreement had a substantive right not to subsidize their bargaining agent's political and ideological activities. Here, on the other hand, all "potential objectors"—i.e., all nonmembers—are entitled to "sufficient information to gauge the propriety of the union's fee," *Hudson*, 475 U.S. at 306, and to have available the other procedural safeguards that are "the constitutional requirements for the Union's collection of agency fees," *id.* at 310. *See George v. Baltimore City Public Schools*, 117 F.R.D. 368, 371-72 (D. Md. 1987) (distinguishing *Allen* from a case such as this).[4]

Stripped to its essence, District 925's Opposition relies solely upon *Gilpin v. AFSCME*, 875 F.2d 1310, 1313 (7th Cir.), *cert. denied*, 493 U.S. 917 (1989), and derivatively, *Kidwell v. Transportation Communications International Union*, 946 F.2d 283, 306 (4th Cir. 1991), *cert. denied*, 112 S. Ct. 1760 (1992), decisions which were wrong. Those decisions misstate critical facts by suggesting that nonunion employees who receive free legal aid provided by the National Right to Work Legal Defense

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[4] The class is defined as "employees of the University of Cincinnati within the relevant bargaining unit: (1) who are represented exclusively for purposes of collective bargaining by ... District 925 and (2) who are nonmembers of ... District 925, or were nonmembers on 3 May 1990." R. 1 at 6, ¶ 12. Similar classes were certified in *George*, 117 F.R.D. at 371-72; *Mitchell v. Los Angeles Unified Sch. Dist.*, 744 F. Supp. 938, 944 (C.D. Cal. 1990), *rev'd on other grounds*, 963 F.2d 258, 262 (9th Cir.), *cert. denied*, 113 S. Ct. 375 (1992); *Hohe v. Casey*, 128 F.R.D. 68, 72 (M.D. Pa. 1989); and *Damiano v. Matish*, 644 F. Supp. 1058, 1060 (W.D. Mich. 1986), *rev'd on other grounds*, 830 F.2d 1363 (6th Cir. 1987).

Foundation, Inc., and its staff attorneys are *per se* inadequate class representatives under Fed. R. Civ. P. 23. These cases both rely upon sheer speculation about: (1) wishes of absent class members; and (2) consequences of an award of the relief sought. Since *Gilpin* and *Kidwell* are rooted in "sheer speculation," *McKesson Corp.*, 496 U.S. at 46, they conflict with this Court's standards regarding the usual and accepted bases for judicial decisionmaking. Likewise, District 925 cites no facts or evidence supporting the Sixth Circuit's economically anti-rational theory that some nonmembers do not want their unlawfully seized property returned to them. That theory, too, is "sheer speculation."

II. DISTRICT 925 REWRITES FIRST-AMENDMENT LAW BY SUGGESTING THAT INFRINGEMENTS ARE NOT MEASURED AGAINST THE "LEAST-RESTRICTIVE MEANS" TEST WHEN THEY BENEFIT UNIONS.

Most striking is District 925's failure to identify even a single compelling state interest served by the state's seizure (by definition, absent consent) of the nonmembers' money for union political activities. Like the court of appeals, Pet., App. A at 15a-19a, the union fails to explain how such a practice meets First-Amendment scrutiny. Indeed, reference to the First Amendment appears only in the body of a quote from a Ninth Circuit decision. Opp. at 16, quoting *Mitchell*, 963 F.2d at 262.

Instead, the union relies upon this Court's decisions in *Railway Employes' Department v. Hanson*, 351 U.S. 225 (1956), *Street*, and *Allen*. Opp. at 14-15. District 925's reliance is misplaced. Those cases did not address the narrow question regarding **nonmembers**—all "potential objectors," *Hudson*, 475 U.S. at 306—presented here. Unlike Petitioners, employees in *Hanson*, *Street*, and *Allen* did not challenge the requirement that they object to the union's political, ideological, or other nonbargaining spending to avoid paying for those activities. *E.g.*, Brief for Respondents at 6-7, *Allen*, *supra* (No. [62-] 316).

District 925's Opposition illustrates why those decisions are

inapplicable. While claiming that *Street* "first established the proposition that **non-union members** wishing to pay less than full union dues have the burden of informing the union of their desire to pay only those expenses related to collective bargaining," Opp. at 14 (emphasis added), the union then quotes this Court's actual holding that remedies are available only to "**employees** who have made known to the union officials that they do not desire their funds to be used for political causes to which they object." *Street*, 367 U.S. at 744 (emphasis added), *quoted at* Opp. at 15. **Three times** in that same passage this Court uses the word "employee," not the more specific word "nonmember." Use of the more general term was necessary because *Street*, 367 U.S. at 742, involved a "union-shop agreement," not an agency shop. Thus, District 925 and the Sixth Circuit are mistaken when they assert that those cases impose an initial "objection" requirement on **nonmembers** to prevent the seizure of admittedly nonchargeable amounts. *Id.* at 14.

Likewise, plaintiffs in prior cases had made their objections known to the unions. *Lehnert v. Ferris Faculty Ass'n*, 111 S. Ct. 1950, 1956 (1991); *Hudson*, 475 U.S. at 297; *Ellis v. Railway Clerks*, 466 U.S. 435, 439 (1984); *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 212-14 (1977); *Allen*, 373 U.S. at 118-19 & n.6; *Street*, 367 U.S. at 744. Thus, this critical issue has not been directly or indirectly decided by this Court.

Similarly, reliance upon *Hudson*'s comments regarding "objection," Opp. at 15, is misplaced. In *Hudson*, 475 U.S. at 306, "objection" is necessary to invoke the process to challenge the union's calculation of the fee, not to prevent the seizure of full union dues. Thus, this Court held that "the nonunion employee has the burden of raising an objection, but ... the union retains the burden of proof," *id.*, not unreasonably requiring that individuals act to invoke adjudicative procedures.

Further, this Court could not have been discussing "objection" in the context at issue here, because the union in *Hudson* could not exact an amount equal to full union dues from nonmembers. The relevant statute authorized the exaction only

of the employee's "'proportionate share of the cost of the collective bargaining process and contract administration.'" *Id.* at 295 n.1, quoting Ill. Rev. Stat., ch. 122, ¶ 10-22.40a (1983). Consequently, the collective bargaining agreement authorized the employer to seize only a fee equal to the employee's *pro rata* share of the union's expenditures for collective bargaining, contract administration, and grievance adjustment. 475 U.S. at 295-96.

III. THE FULL REFUND ORDERED UPON ENTRY OF THE PRELIMINARY INJUNCTION IS NOT FINAL AND WAS NOT FOR THE ENTIRE CLASS; *ALLEN*'S LIMITS ON AN APPROPRIATE REMEDY ARE NOT APPLICABLE IN THIS CONTEXT.

District 925 and the court of appeals, Pet., App. A at 20a, rely upon *Street*, 367 U.S. at 775, and *Allen*, 373 U.S. at 122-24, to conclude that full restitution of fees seized prior to *Hudson* compliance is "unwarranted." Opp. at 16-17. Those decisions are not controlling because they are inapposite.[5] Both cases only establish the appropriate remedy for an excessive **collection** of an objectors' fees. *See Street*, 367 U.S. at 775 (a refund of nonchargeable expenditures); *Allen* 373 U.S. at 122-24. Neither addresses the appropriate remedy for failure to comply with "the constitutional requirements for the Union's collection of agency fees." 475 U.S. at 310. *Hudson* is clear and unambiguous on this point; unions must comply with the "constitutional require-

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[5] District 925 also misrepresents the Record by stating that its new notices and procedures "satisf[y] Arbitrator Florman's requirements and the District Court's subsequent May 31, 1991 decision," and that its "procedures now comply with *Hudson*." Opp. at 6, 16; *see also id.* at 2 ("procedures now in use have not been challenged" by Petitioners). Petitioners remain protected against "fair share fee" seizures by an injunction entered on remand from the Sixth Circuit's reversal of the denial of their Motion for a Preliminary Injunction, Pet., App. E at 47a; *see also* R. 61, which, as of the date of the filing of this Brief, Respondents have not moved to dissolve. No court has adjudicated the adequacy or validity of any of District 925's notices or procedures promulgated after the 31 May 1991 decision.

ments" **before** they collect **any** fees, as the court of appeals itself conceded. Pet., App. A at 20a.

Only a full refund of all fees will insure that unions comply with the minimum constitutional standards for notice and procedures established in *Hudson*; only this remedy will "avoid a recurrence of the violation." *National Soc'y of Professional Eng'rs v. United States*, 435 U.S. 679, 697 (1978); *see also Elvin v. Oregon Public Employees Union*, 832 P.2d 36, 42 (Or. 1992), (full restitution is not punitive in this context). If full refunds are not required, unions self-evidently have affirmative economic incentives to ignore the "constitutional requirements" and to keep the nonmembers "in the dark" about their rights. *See Hudson*, 475 U.S. at 306, 310.

Finally, the assertions that the relief sought by Petitioners "could have crippled District 925's ability to represent all members of the bargaining unit," that some "non-union 'free riders' ... hoped to benefit from some aspects of union representation," and that the "financial destruction of the union" would have resulted from the Plaintiffs' success in obtaining all of the relief sought, Opp. at 10, are nothing more than alarmist, speculative cant, unsupported by **any** record evidence.[6] A full refund would merely put the union into the position it was in prior to the enforcement of its illegal fee seizure scheme.[7]

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[6] Even assuming that there were record evidence supporting these apocalyptic conjectures, we are aware of no case which stands for the proposition that a tortfeasor is relieved from compensating its victims because it would suffer as a result of an appropriate award to them.

[7] Likewise, the assertion that full restitution "would undeniably deny the union that 'fair share'" or "unduly penalize the union," Opp. at 17, is singularly self-serving under the facts of this case. *Inter alia*, the union made extraordinary efforts to burden the nonmembers' exercise of their First-Amendment rights by imposing a requirement that **three** certified mailings be made to fully navigate its original procedures and through other violations of *Hudson* found by the district court. R. 1, Ex. B; App. E at 60a.

IV. EVEN IF ONLY THE NONCHARGEABLE PORTION OF THE FEE MUST BE REFUNDED, FEDERAL COURTS MUST ADJUDICATE AND AWARD DAMAGES FOR CONSTITUTIONAL TORTS.

Rather than addressing the district court's failure to fulfill its Article III duties, District 925 recasts this issue, stating that Petitioners were required to controvert the "arbitrator's findings as to the propriety of the fee with *facts*." Opp. at 19 (emphasis in original). But, the propriety of the district court's rubber-stamping of the "arbitrator's" decision is simply **not** a question of summary judgment practice, as District 925 suggests. *Id.* at 18-20.[8] The union's argument fails for three reasons.

First, nonmembers are **never** required to prove a union's chargeability claim wrong; the union must prove that the amount of its claim for fees is valid. *See, e.g., Hudson*, 475 U.S. at 306 & n.16. Here, if District 925 is correct, the district court impermissibly shifted the burden of proof to the nonmembers.

Second, District 925 distorts *Hudson* by selective quotation. While "expeditious arbitration might satisfy the requirement of a reasonably prompt decision by an impartial decisionmaker," *id.* at 308 n.21, *Hudson* does not validate the lower court's treatment of that decision (even if it had been true arbitration) by reason of that observation. To the contrary, this Court specifically held that "[t]he arbitrator's decision **would not** receive preclusive effect in any subsequent § 1983 action." *Id.* (emphasis added), citing *McDonald v. City of West Branch*, 466 U.S. 284

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[8] District 925 continuously misrepresents its intra-union proceeding "under procedures administered by the American Arbitration Association" as an "arbitration," and the decisionmaker as an "arbitrator." Opp. at 3. Petitioners neither consented to nor participated in that proceeding. Pet. at 27 n.24. District 925 devalues simple words and misrepresents the nature of that proceeding by continuing to refer to it as "arbitration." *See AT&T Technologies v. CWA*, 475 U.S. 643, 648-49 (1986) ("arbitrators derive their authority to resolve disputes only because the parties have agreed in advance to submit such grievances to arbitration").

(1984). Chargeability is a **legal** question in the first instance, *Lehnert*, 111 S. Ct. at 1959; *Ellis*, 466 U.S. at 447-48, *Hohe v. Casey*, 956 F.2d 399, 409 (3d Cir. 1992), and Petitioners clearly raised these **legal** issues in response to the union's submission of the phony "arbitrator's" decision as part of its summary judgment motion. R. 40 at 23-25.[9]

Finally, even by its own standards, Pet., App. C at 40a, the district court must be reversed. It was temporally impossible for the "arbitrator" to apply the appropriate standard for chargeability because her decision—and the district court's rubberstamping of it—occurred before this Court's decision in *Lehnert*.

By ignoring the question presented by the Petition, District 925 *ipso facto* concedes that the district court abdicated its duty to provide the Petitioners with "federal adjudication" of their claim for damages, *Commodity Futures Trading Commission v. Schor*, 478 U.S. 833, 850 (1986), and ignored its obligation to award at least nominal damages for the violations of the Petitioners' "right to procedural due process," *Farrar v. Hobby*, 113 S. Ct. 566, 573 (1992), which it did find. The district court violated these principles by flatly refusing to adjudicate Petitioners' damages, and treating non-judicial determination as though it were a judgment binding upon the Petitioners.[10]

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[9] The union's representation that "Plaintiffs never contested with facts the arbitrator's determination that the 90% fair share fee had been properly calculated by the union," Opp. at 19, consciously misrepresents the Record. Petitioners repeatedly showed that the standards to determine chargeability applied by the union are constitutionally overbroad and that the "arbitrator's" legal findings on chargeability are *per se* erroneous. *See* R. 1, ¶¶ 39, 41, 42; R. 32 at 18-24; R. 40 at 12-16, 23-25.

[10] District 925 quotes the district court's conclusion that "The arbitrator correctly determined that the chargeability determination made by District 925 is valid." Pet., App. C at 43a. However, the union fails to mention that the district court based its conclusion solely on the finding that "the arbitrator thoroughly examined the extensive financial documentation buttressing the

(continued...)

This result transforms *Hudson*'s requirement that unions **provide** "a reasonably prompt **opportunity** to challenge the amount of the fee before an impartial decisionmaker," 475 U.S. at 310 (emphasis added), into a practical obligation that **the nonmember** seek and **exhaust** relief before that "impartial decisionmaker," contrary to *Patsy v. Florida Board of Regents*, 457 U.S. 496, 501 (1982). This nakedly denies Petitioners their right to instead seek relief in the federal courts under 42 U.S.C. § 1983. It permits unions to "adjudicate" constitutional issues before nonconsensual "arbitrators" without the nonmembers' participation or actual challenge even where, as here, the nonmembers affirmatively sought relief in the federal courts. This grossly deviates from *Hudson*'s protections, which by their own terms are designed to insure and facilitate the protection of nonmembers' constitutional rights, and violates Petitioners' "personal right ... to demand Article III adjudication of [their] civil suit." *Pacemaker Diagnostic Clinic v. Instromedix*, 725 F.2d 537 (9th Cir.) (*en banc*, opinion by Kennedy, J.), *cert. denied*, 469 U.S. 824 (1984).

CONCLUSION

The Petition should be granted as to all questions presented.

Respectfully submitted,

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[10](...continued)
calculations." *Id.* at 40a. The Record shows that only portions of the "arbitration" record were before the district court, and that the district court could not and did not examine the complete "arbitration" record to support its rubber-stamping of the "arbitrator's" decision. R. 34.